RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3824-14T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

HITEN A. PATEL, a/k/a
HITENDRA A. PATEL,

Defendant-Appellant.

Argued September 20, 2016 – Decided January 18, 2017

Before Judges Koblitz, Rothstadt and Sumners.

On appeal from Superior Court of New Jersey, Law Division, Atlantic County, Indictment Nos. 13-04-1262 and 13-08-2190.

Steven E. Braun argued the cause for appellant (Bruno & Ferraro, attorneys; Steven E. Braun, of counsel and on the brief).

Sevan Biramian, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for respondent (Diane Ruberton, Acting Atlantic County Prosecutor, attorney; Mr. Biramian, of counsel and on the briefs).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant Hiten A. Patel challenges his April 2, 2015 convictions and sentence for a series of sexual assaults on seven vulnerable young women, most of whom had criminal records and used drugs. He found his victims walking on the street in Atlantic City during the summer of 2012.

Defendant testified at trial that starting in 2008 or 2009, he regularly went to Atlantic City to have sex with prostitutes one to three times a week. He testified that he never sexually assaulted any of the women in this case, never told the women that he was a police officer and never threatened them with an imitation gun. The jury, by its verdicts, did not believe his testimony.

Defendant, a first offender, received an aggregate sentence of forty-six years in prison, with forty-five of those years subject to an 85% parole ineligibility period pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2. After reviewing the record in light of the contentions advanced on appeal, we affirm both his convictions and sentence.

I. CHARGES

On April 30, 2013, an Atlantic City grand jury issued a thirty-six count indictment, Indictment No. 13-04-1262, charging defendant with: five counts of first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a) (counts one, eight, fourteen, twenty-three, and twenty-eight); six counts of third-degree criminal

restraint, N.J.S.A. 2C:13-2 (counts two, four, nine, twenty-one, twenty-five, and thirty-one); one count of second-degree sexual assault, N.J.S.A. 2C:14-2(c) (count three); two counts of second-degree attempted aggravated sexual assault, N.J.S.A. 2C:5-1 and 2C:14-2(a) (counts five and nineteen); six counts of fourth-degree possession of an imitation firearm, N.J.S.A. 2C:39-4(e) (counts six, eleven, fifteen, twenty, twenty-four, and twenty-nine); five counts of third-degree terroristic threats, N.J.S.A. 2C:12-3(a) (counts seven, twelve, eighteen, twenty-two, and thirty-three); four counts of fourth-degree impersonation of a law enforcement officer, N.J.S.A. 2C:28-8(b) (counts ten, seventeen, thirty-two, and thirty-six); two counts of first-degree kidnapping, N.J.S.A. 2C:13-1(b) (counts thirteen and twenty-seven); two counts of second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1) (counts sixteen and thirty); one count of second-degree attempted robbery, N.J.S.A. 2C:5-1 and 2C:15-1 (count twenty-six); one count of third-degree luring, N.J.S.A. 2C:13-7 (count thirty-four); and one count of fourth-degree luring, N.J.S.A. 2C:13-7 (count thirty-five).

On August 14, 2013, an Atlantic County grand jury issued a ten-count indictment, Indictment No. 13-08-2190, charging defendant with: two counts of first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a) (counts one and six); two counts of

third-degree criminal restraint, N.J.S.A. 2C:13-2 (counts two and seven); two counts of third-degree terroristic threats, N.J.S.A. 2C:12-3(a) (counts three and eight); two counts of fourth-degree impersonating a public servant or law enforcement officer, N.J.S.A. 2C:28-8(b) (counts four and nine); and two counts of fourth-degree possession of an imitation firearm, N.J.S.A. 2C:39-4(e) (counts five and ten).

II. Pretrial Motions

Because defense counsel may have represented one of the victims named in Indictment No. 13-04-1262 at a violation of probation proceeding, Judge Bernard E. DeLury, Jr. severed counts one, two, and thirty-six relating to this victim "to remove any question of taint regarding [defense counsel's] ability to cross-examine or otherwise investigate the case."

The judge also severed counts three, four, and thirty-four of the same indictment, relating to another victim, finding that the counts were "too far removed" in time. Due to the State's failed efforts to locate a third victim, the judge also granted the State's request to sever counts six, seven, eight, nine, and ten from Indictment No. 13-08-2190.

The following facts are adduced from trial testimony.

III. Assault on M.D.[1] on June 27, 2012

Thirty-four-year-old M.D. was working as a prostitute on Pacific Avenue near a strip club. Defendant approached M.D., told her that his name was Dexter, and asked her if she wanted "to have a good time," offering her $150. While the van was parked, M.D. took her clothes off and went into the back with defendant. Defendant reached down, pulled out a silver gun, and said "freeze, bitch." Defendant told M.D. that he was not going to kill her, but would not let go of M.D.'s arm. She "went for the front door," he released her arm and she ran outside of the car to the first house she saw.

She knocked on the door, pounding and screaming. The homeowner testified that M.D. said "please help, please call 911, somebody tried to rape me and is chasing me around the neighborhood." He then called 911, explained the situation to the operator, gave M.D. clothes, and told her to hide at "a cubby" outside of his house. The officer who first arrived testified that M.D. "was shaking, crying and really scared." M.D. gave the officers a narrative of the events and a description of the man who assaulted her. M.D. only told the police later that she had met defendant the week before. She didn't say she knew him at

[1] We use initials to protect the identity of the victims. R. 1:38-3(c)(12).

first "because [she] didn't want them to know [she] was prostituting."

A month later, M.D. was again working as a prostitute when defendant drove up and asked her if she wanted "to have a good time." M.D. recognized defendant and "tried to stall him to stay." When M.D. walked closer to defendant's van, defendant said "oh, I'll be back in 10 minutes." Defendant's "face dropped like he knew who [she] was." He drove away and M.D. called the police. Several days later, M.D. selected defendant's photograph out of a photo array.

At trial, defendant admitted to hiring M.D. for sex but denied sexually assaulting her. Defendant said when they were in the car, defendant was unable to obtain an erection and M.D. "was getting angry because it was taking too long." M.D. ended the assignation and defendant then realized his wallet was missing. Defendant claimed he pulled out a silver toy gun only after M.D. punched him three times in the face. Defendant said M.D. saw the gun, threw the wallet back at him, and ran out of the car without her clothes.

IV. Assault on J.R. in June or July 2012

J.R., a twenty-five-year-old mother, was working as a prostitute and living in "a big house where everyone either sells drugs, does drugs, or is a prostitute." Defendant pulled up next

to J.R. on the street to solicit her services. J.R. got into the car where defendant told her "his friends were in the casino gambling . . . and he was waiting for them to get out." They drove to the Atlantic City Aquarium and parked the car. Defendant got out of the car to use the bathroom and J.R. went into the backseat to take her clothes off. Defendant returned, and as she was taking her clothes off, he pulled out a silver gun. Defendant told J.R. to get completely naked and sexually assaulted her. Defendant told J.R. "he was an Atlantic City police officer" and "if [she] were to come back out that night, he would have another partner that was riding around that would arrest [her]."

In early August, J.R. saw defendant's face and a story similar to her assault in the newspaper. She called the Atlantic City Police Department (ACPD) and reported the assault. Defendant claimed he never picked up J.R. because "[s]he looked dirty . . . like a homeless person."

V. Assault on G.H. in July 2012

Eighteen-year-old G.H. lived with her boyfriend in Atlantic City. She was walking past a liquor store between Kentucky Avenue and New York Avenue one night when a silver van driven by defendant pulled up beside her. Defendant told G.H. that "he was looking to have fun." G.H. told him that she was not a prostitute but "knew girls that could help him with that." She offered to take

him to these girls and went inside his van in exchange for money. G.H. then "got a weird vibe from him" and asked defendant to pull over at a convenience store so she could leave. G.H. stated the next thing she remembered was waking up handcuffed in the back of defendant's van. She looked out the van window and saw that she was in Ventnor. Defendant told G.H. that his name was Max. He explained that he was an undercover Atlantic City detective, arresting G.H. for prostitution. G.H. told defendant that she was not a prostitute and asked to see his badge. Defendant refused and the two began arguing. Defendant pulled out a silver gun and hit her with it "several times," ripped off her clothes and sexually assaulted her.

After the assault, both parties went to the front seat. There, defendant gave G.H. permission to smoke a cigarette. G.H. reached into her purse to dial 911 on her cell phone. Defendant slammed on the brakes causing G.H. to hit her head on the dashboard. Defendant told G.H. that "his partner was in the area nearby, and if [she] was to say anything to anybody or try to get somebody's attention when he let [her] out of the van, that he would kill [her] and [her] entire family." Defendant then let G.H. out of the van in Atlantic City.

G.H. did not go to the hospital or call the police because she had a municipal court warrant for non-payment of a fine. On

the morning of July 20, 2012, G.H. called her mother, crying. G.H. would not tell her mother what was wrong. The following morning, according to her mother, G.H. told her "that she had been raped."

On August 22, 2012, at approximately 7:30 p.m., G.H. went to the Atlantic County Justice Facility (ACJF), a jail, to visit her boyfriend. He told G.H. that a man came into the jail "for raping all of these girls" and asked G.H. for a description of her attacker. In the midst of their conversation, he told G.H. to look behind her. When she did, she saw defendant. The next day, G.H. reported the sexual assault to the ACPD and later picked defendant's photo from an array.

At trial, defendant admitted to picking G.H. up to engage in sexual activity. He stated, however, that he heard G.H. coughing and told her "I don't think we can do anything" because it "turned [him] off." Defendant said he did not give G.H. money and G.H. responded "[G]ive me the money or my boyfriend is going to kill you." Defendant then pulled out his gun and G.H. stepped out of his car.

VI. Assault on K.G. on July 17, 2012

K.G., who was eighteen years old, and her boyfriend, both Delaware residents, went to stay in Atlantic City. They began to argue that night, and K.G. left the motel. K.G. walked ten minutes in the direction of where she believed the train station was

located. Defendant drove up to K.G. and offered her a ride, which K.G. accepted. Defendant told K.G. that his name was Max.

Defendant stopped on the side of the road to use the bathroom. Defendant told K.G. to put her cell phone in the back window of the car. Defendant then pulled a gun out, put it in K.G.'s face, and said "you can do it willingly or unwillingly."

While defendant was making a left turn, K.G. unlocked the door, opened it, and jumped out of the vehicle. She hit her head on the ground, then got up and ran into a Corvette car dealership. She hid under one of the cars for ten minutes and then ran into the highway.

She saw a bus pull out at a bus stop and got on the bus at 1:25 a.m., telling the bus driver that "they're after me, they're trying to get me, trying to rape me, they're coming." The bus driver also testified that K.G. told her that "someone was trying to kill her" and requested the bus driver not call the police. K.G. called her friend from the bus and told him that she needed help; the friend called K.G.'s mother, but did not reveal exactly what had transpired. The bus driver took K.G. to Shore Memorial Hospital where K.G. received nine staples to the back of her head.

On July 26, 2012, K.G.'s aunt saw defendant on television. The aunt took a picture of him and texted the picture to K.G.'s

mother, asking if the man was K.G.'s attacker. K.G. contacted the ACPD that day.

Defendant testified that he picked up K.G. believing that K.G. was a prostitute. Defendant said he knew she was a prostitute because K.G. waved at him, smiled at him, and gave him a "signal." According to defendant, K.G. asked if he wanted "to have some fun" and "have a date." After he gave K.G. money, he "realized that she was going to make a run for it." K.G. then held out a box cutter and told defendant she was "going to cut [him]." Defendant then took out his toy gun and K.G. jumped out of the moving car.

VII. Assault on L.C. in July 2012

Around midnight, twenty-five-year-old L.C. was working the streets as a prostitute when she was approached by a silver four-door sedan driven by defendant. He asked her if she "wanted to hang out" and asked her the price. According to L.C., defendant told her that they "were going to go to a friend's house" and that "he just left Taj Mahal gambling with his friends."

Defendant and L.C. then drove to Chelsea Heights and parked the car at the bay. Defendant got out of the car to use the bathroom. When defendant was back inside the car, defendant and L.C. both went into the backseat and defendant asked L.C. if she had any condoms. While L.C. was looking in her purse, L.C. looked up and saw that defendant had pulled out a silver gun. L.C.

attempted to open the door but the child locks were in place. Defendant and L.C. began to struggle. Defendant pulled off L.C.'s underwear and vaginally penetrated her with his hand. L.C. saw a young black man walking down the street. According to this young man's testimony, L.C. screamed that "she was about to get raped and a guy had a gun." When defendant looked up and saw the passerby, L.C. broke loose, rolled down the window, reached outside, opened the door and escaped, leaving behind her purse. L.C. took a taxi to her pimp's location where he told her not to call the police because they were committing an illegal activity.

In September 2012, L.C. reported the July 2012 assault and identified defendant from a photo array. At trial, defendant admitted to picking up L.C. and said she consensually performed oral sex on him.

VIII. Assault on I.S. Between June and August 2012

Nineteen-year-old I.S. was walking along Pacific Avenue when defendant, driving a silver car, waved her down and asked her if she needed a ride. I.S. responded that she needed to go to the bus station and entered into the backseat. Defendant parked, came into the backseat, and pulled out a silver gun from under the seat. He held the gun against I.S.'s head, told her that he was an undercover cop, and asked if she had any drugs on her. I.S. said no, and defendant said if she "didn't give him a blow job,

that he would turn [her] into the police station and charge [her] with prostitution." After I.S. refused, defendant then pulled the gun out again, grabbed her by the throat, pulled her pants down and sexually assaulted her. Afterwards, defendant dropped her off at a pizzeria on Pacific Avenue.

I.S. was hysterical. She begged for change, got on a bus, and left to go to her mother's residence. I.S. continued to use heroin and began smoking crack after the incident. She did not report the incident to the police because she had violated the pre-trial intervention program[2] and was worried she would have to go to jail for the violation.

On September 18, 2012, after her arrest for possession of drugs, I.S. was waiting in the interview room of the ACJF. I.S. saw defendant pass by and started crying. She told the woman next to her, "[T]hat guy ruined my life, he raped me." I.S. later identified defendant from a photo array.

At trial, defendant stated that he did not remember ever seeing I.S. working as a prostitute. Rather, he stated that the first time he saw her was at the ACJF.

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[2] The pre-trial intervention program is governed by N.J.S.A. 2C:43-12 to -22, Rule 3:28, and the Guidelines for Operation of Pretrial Intervention in New Jersey, Pressler & Verniero, Current N.J. Court Rules, Guidelines 1-8 at 1190-1198 (2016).

IX. Assault on T.D. and Defendant's Arrest on August 2, 2012

At the end of July 2012, the ACPD and the FBI began investigating a series of sexual assaults occurring in Atlantic City that summer. On the night of August 2, 2012, defendant was under surveillance. He drove his van to Atlantic City with police officers following. In Atlantic City, at approximately 10:00 p.m., his van pulled up to a curb on Pennsylvania Avenue, next to T.D., a twenty-one-old mother of four children, and two of her friends. According to T.D., defendant was wearing a badge around his neck and told T.D. that he was a police officer. In the van, defendant told T.D. that he was "doing an investigation on the drugs in Atlantic City and the prostitution."

The van entered the parking lot of the Atlantic City Aquarium, with the police car following. When T.D. asked defendant to take her back to the motel, defendant pulled a silver gun out and told her that she "can't tell" because he was a police officer with three partners in the area. Defendant told T.D. to get in the back seat and pull her pants down. After T.D. complied, defendant, holding the gun to T.D.'s head, began choking and raping her. He told T.D. "to suck his dick" and forced oral sex on T.D. for three minutes. T.D. asked defendant "could you please use the condom if you're going to rape me" and defendant "said no." He then sexually assaulted her while T.D. was "begging please don't kill

me, please don't kill me." Defendant then ejaculated inside her. The State presented expert testimony that defendant's DNA was found on T.D.'s body.

Around fifteen minutes later, the van left the parking area with the police car following. Back in Atlantic City, T.D. exited the van and, when questioned by an officer, stated she was sexually assaulted by an individual armed with a firearm.

Other police officers continued to follow the van after T.D. got out, and conducted a motor vehicle stop. Because of the officers' suspicion that the driver possessed a handgun, the stop was considered high-risk. An officer asked defendant, "[W]here is the gun?" Defendant told the officers that "his son's toy gun might be under that seat," where a toy gun was indeed found.

Defendant denied T.D.'s allegations at trial. He said T.D. and two other girls walked towards him and asked him if he wanted to party. Defendant stated that he "knew they were prostitutes." According to defendant, the two did not engage in intercourse and T.D. merely "masturbate[ed] [him] with her hand." Defendant stated that he ejaculated too quickly and "didn't get sex."

Defendant not only testified on his own behalf, he also presented twelve character witnesses.

X. Convictions

Following the testimony, pursuant to the State's motion, the trial judge amended count thirteen of Indictment No. 13-04-1262 from first-degree kidnapping to third-degree criminal restraint. The judge also dismissed count twenty-seven of Indictment No. 13-04-1262 in its entirety pursuant to the State's application. The jury acquitted defendant of counts nine, thirteen, fourteen, sixteen, seventeen, eighteen, twenty-three, twenty-five, thirty, thirty-one, and thirty-five of Indictment No. 13-04-1262 and count two of Indictment No. 13-08-2190. It convicted him of the remaining counts.

Defendant raises the following issues through counsel on appeal:

> POINT I: THE TRIAL COURT SHOULD HAVE SEVERED EACH SEPARATE ALLEGED INCIDENT PRIOR TO PROCEDING TO TRIAL.
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> POINT II: PRINCIPLES OF FUNDAMENTAL FAIRNESS REQUIRE THAT THE CONVICTIONS BE REVERSED BECAUSE THE JOINDER OF SEVEN INCIDENTS OF ALLEGED SEXUAL ASSAULT LED THE JURY TO CONVICT BASED UPON THE CUMULATIVE TESTIMONY OF THE STATE'S ALLEGED VICTIMS.
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> POINT III: BY NOT INTERCEDING IN THE FINAL ALLEGED INCIDENT, THE STATE VIOLATED MR. PATEL'S CONSTITUTIONAL RIGHTS BY COMMITTING DUE PROCESS ENTRAPMENT (NOT RAISED BELOW).
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> POINT IV: THE IDENTIFICATION PROCEDURE EMPLOYED BY LAW ENFORCEMENT WAS TAINTED BY THE FAILURE OF THE OFFICERS TO ADHERE TO THE REQUIREMENTS OF STATE V. HENDERSON, 208 N.J.

208 (2011), AND MR. PATEL WAS PREJUDICED BY THE LACK OF ANY ANALYSIS BY THE TRIAL COURT REGARDING THE VARIABLES WHICH COULD RENDER THE INDENTIFICATIONS AS UNRELIABLE.

POINT V: THE PHOTOGRAPHIC LINEUP WAS TAINTED BY THE FACT THAT MR. PATEL WAS OBSERVED IN THE ATLANTIC COUNTY CORRECTIONAL FACILITY.

POINT VI: MR PATEL'S STATEMENTS WERE TAKEN IN VIOLATION OF HIS RIGHT NOT TO INCRIMINATE HIMSELF PURSUANT TO THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE NEW JERSEY COMMON LAW RIGHT NOT TO INCRIMINATE ONESELF.

POINT VII: THE TRIAL COURT SHOULD HAVE GRANTED MR. PATEL'S MOTION TO SUPPRESS EVIDENCE SEIZED FROM HIS VEHICLE UPON HIS ARREST.

POINT VIII: THE TRIAL COURT EMPLOYED AN INCORRECT STANDARD IN DETERMINING WHETHER THE RAPE SHIELD STATUTE SHOULD BE PIERCED.

POINT IX: FRESH COMPLAINT EVIDENCE SHOULD NOT HAVE BEEN ADMITTED.

POINT X: VARIOUS PORTIONS OF THE JURY INSTRUCTIONS WERE ERRONEOUS AND DEPRIVED MR. PATEL OF HIS RIGHT TO A FAIR TRIAL, AND THE FAILURE TO OBJECT CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL (NOT RAISED BELOW).

POINT XI: THE DEFENSE WAS ENTITLED TO THE DISCOVERY REGARDING BETHEA, THE APPARENT "EMPLOYER" OF [I.S.]

POINT XII: THE TRIAL ERRORS, EVEN IF INSUFFICIENT INDIVIDUALLY TO JUSTIFY REVERSAL, NONETHELESS CUMULATIVELY WARRANT REVERSAL OF THE CONVICTIONS.

POINT XIII: THE MOTION FOR A NEW TRIAL AND JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN GRANTED BY THE TRIAL COURT.

> POINT XIV: THE SENTENCE WAS EXCESSIVE AND CONSTITUTED CRUEL AND UNUSUAL PUNISHMENT IN CONTRADICTION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, PARAGRAPH 12 OF THE NEW JERSEY CONSTITUTION.

In his pro se supplemental brief, defendant raises the following two issues:

> POINT XV: WHETHER THE TRIAL COURT ERRED IN FAILING TO GIVE CURATIVE AND REAL TIME INSTRUCTIONS WITH RESPECT TO THE PROSECUTOR'S CONDUCT DURING OPENING AND CLOSING STATEMENTS.
>
> POINT XVI: WHETHER DEFENDANT WAS DEPRIVED OF A FAIR TRIAL WHEN THE STATE INTRODUCED BIANCA ANISKI'S TESTIMONY AND WHETHER THE TRIAL COURT ERRED IN PERMITTING ANISKI TO PROVIDE EXPERT TESTIMONY.

Defendant argues in Point I of his brief that the seven alleged incidents of assault should have been severed and tried individually. Rule 3:15-2(b) provides that the trial court may sever counts into separate trials "or direct other appropriate relief" if the judge finds that the defendant would be prejudiced by a "joinder of offenses." "The decision on a motion for a severance pursuant to R. 3:15-2 is addressed to the sound discretion of the trial court." State v. Johnson, 274 N.J. Super. 137, 149 (App. Div.), certif. denied, 138 N.J. 265 (1994); see also State v. Willis, 225 N.J. 85, 96 (2016) ("The admission or exclusion of evidence at trial rests in the sound discretion of the trial court.").

Evidence of a defendant's prior acts is inadmissible to prove a defendant's disposition for the purpose of showing that he or she "acted in conformity therewith." N.J.R.E. 404(b). In State v. Cofield, our Supreme Court enunciated a four-part test for determining when "other-crime evidence" is properly admitted:

> 1. The evidence of the other crime must be admissible as relevant to a material issue;
>
> 2. It must be similar in kind and reasonably close in time to the offense charged;
>
> 3. The evidence of the other crime must be clear and convincing; and
>
> 4. The probative value of the evidence must not be outweighed by its apparent prejudice.
>
> [127 N.J. 328, 338 (1992).]

Judge DeLury thoroughly considered and applied the four Cofield prongs in his December 1, 2014[3] twenty-page written opinion. We affirm his decision to try these charges together based substantially on the reasons expressed in his written opinion. The judge found that these were not unique, signature crimes, but rather:

> [t]he issue, and the heart of the defense, is that the Defendant was seeking out consensual commercial sex with prostitutes to satisfy his urges for frequent and anonymous sex. The State's heavy burden is to prove that the sex between the Defendant and his victims was

[3] This decision was written after trial to amplify the reasons stated on the record and in anticipation of an appeal. See R. 2:5-1(b).

> accomplished unlawfully by force. To the extent the Defendant would claim mistake as to the consent of any individual victim, the State is entitled to produce sufficient facts to show beyond a reasonable doubt that the victims did not give legally effective consent to sex. Accordingly, it would fall upon the State to prove the unreasonableness of the Defendant's understanding of whether any of these women were willing partners. The State acknowledges, and the Defense will seek to show, that several of the victims were prostitutes and all of them were encountered by the Defendant in a known area of prostitution. As such, a plausible case of mistake as to consent could be raised by the defense. So, the State has shown the need to introduce evidence to dispel a claim of mistake. The frequency of the encounters, their closeness in time, the similarities in place, the remote locations, the displays of threats and force all speak to encounters that were not consensual.

The judge also properly found that "the evidence is similar in kind and close in time to the current charges," satisfying the second prong:

> The State has shown significant and particular similarities among the accounts of all ten victims. Those similarities also pertain to the seven victims that the court has joined for trial. Namely, all victims were picked upon on Pacific Avenue in Atlantic City while they were walking the street or standing in front of a hotel. Nine of the victims identified their attacker as "Indian" and several observed acne scars or pock marks on his face. The similarity of the vehicle type is not as striking with descriptions ranging from a van or a sedan of varying colors. The State also points out that the assaults were accomplished by vaginal penetration in seven cases. Those not penetrated were able to

> escape before the act could be completed. Six of the episodes featured the attacker posing as a police officer and flashing a credential. Eight of the victims reported the attacker using a revolver. Seven of them noted it was silver in color. Three of the victims report being attacked in the darkened parking lot of the Atlantic City Aquarium. The others reported darkened and remote streets and areas in the vicinity of Atlantic City as the locations of the assaults. Finally, the seven women joined in the trial reported these attacks occurred during the summer of 2012 during the span of less than 12 weeks.

Judge DeLury also found that the evidence of the other crimes were proved by clear and convincing evidence:

> The third prong of Cofield requires the evidence must be proved by clear and convincing evidence. This prong has been amply satisfied by the compelling testimony of the victims. The court considered their demeanor on the stand and found them to be credible. Some were scared. Some were reserved. Some were reluctant. However, they all spoke with conviction and resolve about their encounters with the Defendant. Their testimony was largely consistent and recounted the material facts in question. Their testimony was supported by the physical evidence in the case, namely the imitation firearm, the suspect vehicles and police investigation of the surveillance of the Defendant's activities. As such, the State has furnished proof by clear and convincing evidence.

Lastly, the judge found that the probative value of the evidence outweighed the unfair prejudice that would result to defendant:

> Certainly, prejudice attaches to the fact that the jury would learn that the Defendant was accused of committing sexual assaults against seven different women. In this case, however, where the defense has posited that the Defendant was not attacking the women but rather was acting on his strong urge to have frequent and anonymous sex with women for money, that prejudice is greatly ameliorated. Moreover, the probative value of the circumstances of these liaisons is very great when weighed against the apparent prejudice. The nature of the meetings, the extent of the contact, the use of the vehicles in remote locations, the factor of penetration and the presence of police credentials and imitation firearms are highly probative of whether there was a mistake on the part of the Defendant that his sexual relations with these seven women were consensual. Additionally, the court advised the parties that it will undertake to give a very strong cautionary and limiting instruction to the jury on exactly how they should treat the joinder of the charges and the introduction of evidence on the several separate assaults. The great probative value of the evidence to these circumstances, in light of an effective instruction, will diminish any prejudice attendant to the joinder in this case. As such, the apparent prejudice does not outweigh the great probative value and there is no other evidence available that can be used to demonstrate the same points.

We defer to the trial judge's severance determination, based on his credibility determinations as well as his intelligent and reasonable application of the Cofield factors to the issues in this case.

In Point II of his brief, defendant argues that principles of fundamental fairness require that the convictions be reversed

because the joinder of seven alleged incidents of sexual assault led the jury to convict based upon the cumulative testimony of the victims. This point is another way to frame the fourth Cofield factor, that the prejudice of joinder outweighs its probative value, and does not merit further discussion in this opinion. R. 2:11-3(e)(2).

For the first time on appeal, defendant argues in Point III, as plain error, that the State violated his constitutional rights by committing due process entrapment by not interceding in the final incident before he had the opportunity to assault T.D. The police officers testified they were unaware defendant was assaulting T.D. until she left the van. Defendant's legal argument is completely without merit. R. 2:11-3(e)(2).

Defendant argues in Point IV that the identification procedure employed by law enforcement was tainted by the failure of the officers to adhere to State v. Henderson, 208 N.J. 208 (2011), because they "failed to exclusively use photographs of persons who were also of an Indian racial ancestry." He also argues that all of the photographs should have depicted men with scars on their faces. As the trial judge noted, identification was not a central issue at trial.

Nonetheless, out-of-court identifications which result "from impermissibly suggestive procedures" are inadmissible at trial.

State v. Smith, 436 N.J. Super. 556, 564 (App. Div. 2014). In 2011, our Supreme Court enunciated a framework for evaluating the reliability of witness identifications. See Henderson, supra, 208 N.J. at 288-93.

"First, to obtain a pretrial hearing, a defendant has the initial burden of showing some evidence of suggestiveness that could lead to a mistaken identification." Id. at 288. Such a hearing was held here. "Second, the State must then offer proof to show that the proffered eyewitness identification is reliable—accounting for system and estimator variables—subject to the following: the court can end the hearing at any time if it finds from the testimony that defendant's threshold allegation of suggestiveness is groundless." Id. at 289. "Third, the ultimate burden remains on the defendant to prove a very substantial likelihood of irreparable misidentification." Ibid. "Fourth, if after weighing the evidence presented a court finds from the totality of the circumstances that defendant has demonstrated a very substantial likelihood of irreparable misidentification, the court should suppress the identification evidence." Ibid.

The identification procedures employed by law enforcement were not unduly suggestive. Although defendant argues that the photo array should have included only photographs of men of Indian ancestry, the record fails to show whether or not the photo array

contained such individuals. The testimony was that the photo array contained photographs of "similar looking individuals with similar identifiers," which included "features that match descriptions as provided by victims." How the individual appears in the photograph rather than his country of origin is the important criteria. Defendant provides no basis to overrule the sound decision of the trial judge.

In Point V, Defendant argues that the photographic lineup was tainted by the fact that defendant was observed in the ACJF by G.H. and I.S. "One-on-one showups are inherently suggestive 'because the victim can only choose from one person, and, generally, that person is in police custody.'" State v. Jones, 224 N.J. 70, 87 (2016) (quoting State v. Herrera, 187 N.J. 493, 504 (2006)). Here, G.H. and I.S.'s identification of defendant in the jail were not one-on-one showups, but mere happenstance sightings unplanned by law enforcement. Afterward, the victims chose defendant's photograph from a photo array. Although they had seen defendant before choosing his photograph from the array, the police officers did not arrange the jail viewing.

Defendant argues in Point VI of his brief that his out-of-court statements, which were not overtly incriminating, were taken in violation of his right not to incriminate himself pursuant to the Fifth and Fourteenth Amendments of the United States

Constitution and New Jersey common law. U.S. Const. amends. V, XIV; State v. Maltese, 222 N.J. 525, 544 (2015), cert. denied, ___ U.S. ___, 136 S. Ct. 1187, 194 L. Ed. 2d 241 (2016). Defendant contends that he "failed to provide an unequivocal waiver of his right to incriminate himself." "When faced with a trial court's admission of police-obtained statements, an appellate court should engage in a 'searching and critical' review of the record to ensure protection of a defendant's constitutional rights." State v. Hreha, 217 N.J. 368, 381-82 (2014). This review is deferential, requiring us to "defer to the trial court's credibility and factual findings." Id. at 382.

The trial judge held a Rule 104 hearing to determine the admissibility of defendant's statements. Judge DeLury reviewed the transcript of defendant's interview and ruled on the admissibility of defendant's statements. Although the judge found the law enforcement testimony credible, he determined that defendant, at one point, somewhat ambiguously may have invoked his right to an attorney and therefore ruled inadmissible anything he said after that point, ruling that the later portion of the statement could only be used for impeachment purposes. Judge DeLury thus properly enforced defendant's Miranda[4] rights.

[4] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

"Because a police officer must 'scrupulously honor[]' that right, even when the suspect's invocation is 'ambiguous,' officers are 'required to stop the interrogation completely, or to ask only questions narrowly directed to determining whether defendant [is] willing to continue.'" Maltese, supra, 222 N.J. at 545 (alterations in original) (quoting State v. Johnson, 120 N.J. 263, 284 (1990)).

The judge found admissible defendant's brief response when he was arrested, given the officers' fear that a real firearm was located in the van, although defendant was handcuffed next to the van and therefore out of range to reach any gun. See State v. Minitee, 210 N.J. 307, 318 (2012) (stating that a search incident to a lawful arrest in an automobile is restricted "to the area from which an individual may seize a weapon or destroy evidence"). Defendant's comment that his son might have a toy gun under the child's seat in the back of the van, however, was not incriminating in the context of this case. The toy was not contraband and would inevitably have been found in any event.

Defendant also alleges that he invoked his right to remain silent at the beginning of the August 3, 2012 taped interview, rather than later on when the judge found he may have asked for counsel. At the start of the interview, defendant spoke with hesitation, mentioning his family and his job. He told the

detectives that he had worked in Atlantic City and said that he was "not that nice." He also said that he did not know T.D. He gave no clearly incriminating statement and points to none on appeal. "Efforts by a law enforcement officer to persuade a suspect to talk 'are proper as long as the will of the suspect is not overborne.'" State v. Maltese, 222 N.J. 525, 544 (2015) (quoting State v. Miller, 76 N.J. 392, 403 (1978)). The trial judge fully enforced defendant's Miranda rights by viewing the later exchange as an invocation of defendant's right to remain silent.

Defendant argues in Point VII of his brief that the trial judge erred in denying his motion to suppress evidence seized from his vehicle upon his arrest. Defendant contends that the search was unreasonable under the Fourth and Fourteenth Amendments and did not fall within any exception to the warrant requirement.

Following police testimony at a pretrial motion to suppress, the trial judge found the police testimony credible and found that a search warrant had been properly sought. The judge concluded defendant failed to carry "his burden to invalidate this warranted search" and denied defendant's motion to suppress.

Under the Pena-Flores standard, "the warrantless search of an automobile in New Jersey is permissible where (1) the stop is unexpected; (2) the police have probable cause to believe that the

vehicle contains contraband or evidence of a crime; and (3) exigent circumstances exist under which it is impracticable to obtain a warrant." State v. Pena-Flores, 198 N.J. 6, 28 (2009), overruled by State v. Witt, 223 N.J. 409, 450 (2015) (prospective application). Although a telephonic warrant was obtained, the police were concerned about the immediate risk of leaving a real gun in the car and searched the car for the gun before receiving the warrant. Once discovered, the toy gun was left in the car until the warrant was obtained. It would have inevitably been found in the subsequent search. See State v. Sugar, 108 N.J. 151, 156 (1987) (holding improperly obtained evidence is admissible if "the evidence in question would inevitably have been discovered without reference to the police error or misconduct"). Thus defendant's motion to suppress was properly denied.

Defendant argues in Point VIII of his brief that the trial judge employed an incorrect standard in determining whether the rape shield statute should be pierced. Under the Rape Shield Statute (the Act), N.J.S.A. 2C:14-7, "evidence of the victim's previous sexual conduct shall not be admitted nor reference made to it in the presence of the jury except as provided in [the Act]." N.J.S.A. 2C:14-7(a). The Act requires that the judge find "that evidence offered by the defendant regarding the sexual conduct of the victim is relevant and highly material." Ibid.

The judge found that none of the statutory exceptions to the general prohibition of evidence of sexual conduct applied, stating:

> the defense has argued that it needs to be able to explore fully with the victims their sexual histories in order to perhaps shed some light on why they would come forward with their stories. I cannot perceive any basis under the rape shield law that would allow the defendant to make such inquiry subject, however, to the following: I don't believe that the defendant has demonstrated that the evidence that he seeks to admit is relevant, let alone highly relevant and material to his case. I believe that the defendant has not met his very high burden with respect to piercing the rape shield statute. I also find and conclude that while certain of these victims were admittedly working as prostitutes at the time that the defendant solicited sex from them prior to the alleged attacks, that that circumstance may be germane and admissible to how they met and how they began their encounter, and that would be permissible to make inquiry of, but it's not appropriate to discuss with the victims their subsequent sexual activity later in the day, unless you have some question with regard to source of semen, pregnancy or disease to meet the requirements of the statute[].

Judge DeLury's reasoning was sound.

Defendant argues in Point IX that the fresh complaint testimony of both K.G.'s mother and G.H.'s mother should not have been admitted. The trial judge admitted the fresh complaint testimony of D.S., K.G.'s mother, finding it

> is certainly axiomatic that a daughter, especially a young daughter, would confide in

> her mother for something so upsetting and distressing as an assault or attempted rape. Additionally, it does appear to have been made within a reasonable amount of time, and I'm making my determination of reasonableness based on the fact that there were some injuries sustained, that the victim was treating and under a doctor's care for a period of time, may have been also medicated and with the natural fear and concern for that she may have been doing something that her mother would not have approved of, certainly relating within six or seven days is a reasonable period of time. And it also appears that the statements were made spontaneously and voluntarily.

Following D.S.'s testimony, the judge provided the jury with instructions on how to consider fresh complaint testimony.

The trial judge also allowed G.H.'s mother, N.A., to testify, determining the fresh complaint evidence would be

> limited to that she reported to her mother within a day or the day of her coming home that she had been raped in sum and substance and nothing further.

"[T]he decision to admit or exclude evidence is one firmly entrusted to the trial court's discretion." Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 383-84 (2010). The fresh-complaint "doctrine allows the admission of evidence of a victim's complaint of sexual abuse, otherwise inadmissible as hearsay, to negate the inference that the victim's initial silence or delay indicates that the charge is fabricated." State v. R.K., 220 N.J. 444, 455 (2015). "In order to qualify as fresh-complaint

evidence, the victim's statement must have been made spontaneously and voluntarily, within a reasonable time after the alleged assault, to a person the victim would ordinarily turn to for support." Ibid.

We have repeatedly permitted the admission of fresh complaint evidence of this nature even though the delay in reporting the assault was several months or even years. See State v. R.E.B., 385 N.J. Super. 72, 88 (App. Div. 2006) (two-year delay); State v. L.P., 352 N.J. Super. 369, 384 (App. Div. 2002) (delay of nearly one year); State v. Hummel, 132 N.J. Super. 412, 423 (App. Div.) (three-year delay), certif. denied, 67 N.J. 102 (1975). Here, K.G. told her mother about the attempted sexual assault only eight to nine days after the incident. G.H. told her mother about the attack within a couple of days. The trial judge did not abuse his discretion by admitting that testimony.

For the first time on appeal, defendant argues in Point X of his brief that various portions of the jury instructions were erroneous and deprived him of his right to a fair trial, and thus constitute plain error, and that the failure of counsel to object constituted ineffective assistance of counsel.

> In the context of jury instructions, plain error is '[l]egal impropriety in the charge prejudicially affecting the substantial rights of the defendant and sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself

> the error possessed a clear capacity to bring about an unjust result.'
>
> [State v. McKinney, 223 N.J. 475, 494 (2015) (alteration in original) (quoting State v. Camacho, 218 N.J. 533, 554 (2014)).]

Defendant challenges the jury instruction related to defendant having an imitation gun in his car on April 5, 2011, when he was stopped in Atlantic City, allowing the jury to use the incident as a basis for identification as a person who possesses an imitation gun in his car in Atlantic City in the early morning hours. The judge charged the jury:

> The State has introduced this evidence for the limited purpose of identification of the defendant, his car and his presence in Atlantic City near Pacific Avenue during the early morning hours.
>
> Here, the evidence has been offered to attempt to convince you that the prior behavior, that is, driving in Atlantic City and in the early morning hours in a Nissan Maxima with an imitation non-functioning revolver on or near Pacific Avenue, and the current crimes charged in the indictment are so similar and so unique that you may infer that the same person committed both of them. You may not draw this inference unless you conclude that the prior activity with which the defendant is identified is so nearly identical in method as to earmark the crime as the defendant's handiwork. The conduct in question must be unusual and distinctive so as to be like a signature, and there must be proof of sufficient facts in both crimes to establish an unusual pattern.

Defendant argues that allowing the use of this evidence is contrary to the judge's earlier ruling where he found that the nature of defendant's assaults did not rise to the level of a "signature crime" permitting their use to identify him as the perpetrator. The 2011 incident, however, was used only to identify defendant as the owner and driver of the car identified by the witnesses, and someone who had a toy gun in his car, none of which defendant denied.

We do not consider defendant's argument of ineffective assistance of counsel now because such claims are more appropriately reviewed at post-conviction relief proceedings. State v. Lane, 279 N.J. Super. 209, 224 (App. Div.) ("The appropriate forum for resolving [ineffective assistance of counsel] claims is in the trial court on a post-conviction relief petition."), certif. denied, 141 N.J. 94 (1995).

Defendant argues in a single paragraph in Point XI of his brief that he was entitled after trial to discovery regarding Donnie Bethea. Defendant filed a motion for supplemental discovery of an October 16, 2013 police report from the State v. Bethea case file regarding I.S. and other victims of defendant. Pursuant to a court order, the State turned over the pertinent documents to the judge for an in camera review. Defendant claimed "that information pertaining to [I.S.] acting as a prostitute in July

2013 for Donnie Bethea, her drug usage, living arrangements and cooperation with law enforcement 'would likely have provided independent impeachment' of her testimony against [defendant]."

In his November 19, 2014 four-page written opinion, Judge DeLury found that defendant had access to the information in the State's Bethea file through other means during trial. The judge also found the materials contained "no relevant or material information bearing upon the credibility of [I.S.]" and "nothing in the Bethea Materials form[ed] the basis for granting the defendant a new trial pursuant to R. 3:20-1."

We review "the trial court's denial of defendant's discovery requests under an abuse of discretion standard." State v. Enright, 416 N.J. Super. 391, 404 (App. Div. 2010), certif. denied, 205 N.J. 183 (2011). We discern no reason to disturb the trial judge's sound exercise of discretion.

Defendant argues in Point XII that "the trial errors, even if insufficient individually to justify reversal, nonetheless cumulatively warrant reversal of the convictions." As we do not agree that trial errors were made, we need not consider this issue.

Defendant argues in Point XIII that the trial judge erred in denying his motion for a new trial and his motion for a judgment of acquittal. In support, defendant states that he "relies upon the record below" and "submits the court's rationale for denying

the motion was wrong." This unsupported argument is without sufficient merit to warrant discussion in this opinion. R. 2:11-3(e)(2). The trial judge provided a thorough thirteen-page written opinion giving his sound reasons for denying this motion on January 9, 2014.

Defendant argues in Point XIV that his "sentence was excessive and constituted cruel and unusual punishment contrary to the Eighth and Fourteenth Amendments of the United States Constitution and Article 1, Paragraph [Twelve,] of the New Jersey Constitution." Defendant argues that "all of his sentences should have run concurrently" because he was a first offender. Judge DeLury appropriately weighed the aggravating and mitigating factors, N.J.S.A. 2C:44-1(a) and (b), explaining thoroughly his reasons for sentencing in accordance with the code. He imposed the minimum permissible prison term on all second and first-degree convictions, and made all terms concurrent for crimes committed against the same victim.

At the time of sentencing, defendant was a married thirty-six-year-old man with two children. He was an employed college graduate with no prior criminal record. The judge found aggravating factors three and nine,"[t]he risk that the defendant will commit another offense" and "[t]he need for deterring the defendant and others from violating the law"; and mitigating factor

seven, that defendant had no prior criminal history. N.J.S.A. 2C:44-1(a)(3), (9) and N.J.S.A. 2C:44-1(b)(7).

"When the aggravating and mitigating factors are identified, supported by competent, credible evidence in the record, and properly balanced, we must affirm the sentence and not second-guess the sentencing court, provided that the sentence does not 'shock the judicial conscience.'" State v. Case, 220 N.J. 49, 65 (2014) (citation omitted) (quoting State v. Roth, 95 N.J. 334, 365 (1984)).

In determining whether to impose consecutive sentences, the judge must consider the factors enumerated in State v. Yarbough, 100 N.J. 627, 643-44 (1985), cert. denied, 475 U.S. 1014, 106 S. Ct. 1193, 89 L. Ed. 2d 308 (1986). "The sentencing court must not only ensure that facts necessary to establish the elements of the defendant's offense are not double-counted for purposes of sentencing, but that its assessment of the 'nature and circumstances of the offense' fairly reflects the record before it." State v. Fuentes, 217 N.J. 57, 76 (2014) (quoting N.J.S.A. 2C:44-1(a)(1)).

The trial judge properly considered the Yarbough factors when determining whether the seven terms of imprisonment should be applied consecutively, in light of the seven victims assaulted at

separate times. Given the number of violent crimes committed by defendant, the sentence does not shock our judicial conscience.

In defendant's pro se supplemental brief, he first argues, in what we have designated as Point XV, that the trial judge erred in failing to give curative and real time instructions with respect to the prosecutor's allegedly improper conduct during opening and closing statements. Defendant argues that the prosecutor "made comments outside the scope of the evidence" by stating that the victims sustained bodily injury by being handcuffed and choked; and that defendant lied to his family. Defendant also asserts that the prosecutor's opening and closing statements "consisted almost entirely of flagrant appeal for sympathy of victim and flagrant attack on defendant's character and credibility."

In general, "[p]rosecutors are afforded considerable leeway in closing arguments as long as their comments are reasonably related to the scope of the evidence presented." State v. Frost, 158 N.J. 76, 82 (1999). The prosecutor "also may argue all inferences that properly may be drawn from those facts." State v. Timmendequas, 161 N.J. 515, 577 (1999), cert. denied, 534 U.S. 858, 122 S. Ct. 136, 151 L. Ed. 2d 89 (2001). "As all damaging evidence is inherently prejudicial, the court affords the prosecutor considerable leeway in making her opening." Ibid.

The prosecutor did not engage in conduct "clearly capable of producing an unjust result." State v. DiPaglia, 64 N.J. 288, 296 (1974). The prosecutor's comments about the victims' injuries is inferable from the victims' testimony. See State v. Morton, 155 N.J. 383, 416 (1998), (requiring us to consider "the summation within the context of the trial as a whole"), cert. denied, 532 U.S. 931, 121 S. Ct. 1380, 149 L. Ed. 2d 306 (2001). Consistent with the prosecutor's opening statements, for example, T.D. testified that defendant choked her, and G.H. testified that she was handcuffed by defendant. Further, the prosecutor's closing statements were similarly not prejudicial. During the jury charge, the judge stated: "As jurors, it's your duty to weigh the evidence calmly and without passion, prejudice or sympathy."

Defendant's second and final pro se argument, Point XVI, is that he was deprived of a fair trial when the State introduced inadmissible hearsay testimony through the testimony of a nurse and the judge erred when he permitted the nurse to offer expert testimony without qualifying her as an expert witness in forensic science. These arguments were not raised below and must therefore meet the standard of plain error to prevail. R. 2:10-2.

Hearsay is an out-of-court statement "offered in evidence to prove the truth of the matter asserted." N.J.R.E. 801(c). An exception to the prohibition against hearsay are "[s]tatements

made in good faith for purposes of medical diagnosis or treatment which describe medical history" or the cause of the declarant's symptoms "to the extent that the statements are reasonably pertinent to diagnosis or treatment." N.J.R.E. 803(c)(4).

The nurse testified that when T.D. was treated "for sexually transmitted infections" she reported that she had not engaged in consensual intercourse for the last five days. The purpose of the nurse's evaluation, and T.D.'s statement, was to provide treatment, and thus the statement fit within an exception to the hearsay rule.

N.J.R.E. 702 requires that a witness may only provide testimony based on his or her "scientific, technical, or other specialized knowledge" if qualified. The trial judge qualified the nurse as an expert witness "in the field of sexual assault examination." Thus this issue is without merit as well.

Having reviewed all issues raised by defense counsel and defendant and found none to be meritorious, we affirm both defendant's convictions and the sentence imposed.

Affirmed.